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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 1005.

THE SUPERIOR OIL COMPANY,

Petitioner,

v.

THE UNITED GAS IMPROVEMENT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

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Question Presented.

In the light of decisions by this Court in *Catco*[1] and *Transco-Seaboard*,[2] did the Court below err in setting aside an August 10, 1959 unconditional certificate of public convenience and necessity issued to petitioner by the Federal Power Commission under Section 7 of the Natural Gas Act, for sales from offshore southern Louisiana fields at

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[1] *Atlantic Refining Co.* v. *Public Service Commission*, 360 U. S. 378 (June 22, 1959).

[2] *Public Service Commission* v. *Federal Power Commission*, 361 U. S. 195 (December 14, 1959).

an initial price equivalent to those in issue in the cited cases, when

1. the record before the Commission did not contain the supporting evidence of price propriety which *Catco* requires for an unconditional certification at this price level, *and*

2. the Commission had not even instituted the proceedings, in compliance with this Court's *Catco* and *Transco-Seaboard* remand orders, wherein it was adjured to question the propriety of this price level and, in the absence of evidence to support it, to condition the certificates at a non-suspect, lower price line!

Statement of the Case.

The order of the Federal Power Commission (FPC) reversed by the Court of Appeals decision here the subject of a petition for review, was issued in a consolidated proceeding involving two related applications for certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act. Petitioner's application, filed on September 22, 1958, requested FPC authorization for sales of natural gas, at initial prices of 21.4¢ per Mcf, to Transcontinental Gas Pipe Line Corporation from fields located offshore the coast of Vermilion Parish, Louisiana (R. 151). The buyer's application, filed the following day, sought authorization to construct facilities for carrying the gas. The gas sale and purchase contract underlying the applications was dated September 17, 1958 (R. 101).

Less than two weeks earlier, on September 4, 1958, the Commission had issued certificates authorizing, *inter alia*, several natural gas sales by other producers to the same buyer, from the same fields, at the same initial price, under

the same, or substantially the same, contractual provisions as those involved herein.[3] That proceeding was entitled *Transcontinental Gas Pipe Line Corporation, et al.*, Opinion 315, 20 F. P. C. 264. It subsequently became the subject of review by this Court in the *Transco-Seaboard* case, *supra*, ftn. 2.

As noted in the decision of the Presiding Examiner in this proceeding, Transcontinental had acquired about 70 per cent of the production from the subject fields under the contracts certificated in the earlier Transco-Seaboard proceeding. The company proposed to acquire the balance under the contract here in issue (R. 167-168). Accordingly, this proceeding presented no issue that had not been raised and disposed of by the Commission in the prior case. Rather it encompassed an integral part of the overall gas sale and acquisition program which already had been certificated in Opinion 315.

However, since late filing of the instant applications prevented their consolidation with their earlier Transco-Seaboard counterparts, a separate hearing was scheduled in this proceeding for January 13, 1959.[4] Meanwhile, temporary certificates were issued on October 22, 1958, shortly after the Commission's major Transco-Seaboard decision, authorizing prompt commencement of both the gas sale and related pipeline construction (R. 157-158).

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[3] No State severance taxes were currently applicable in the particular offshore fields here involved. However, this contract, like its *Transco-Seaboard* counterparts, provided for reimbursement by the buyer of ¾ of any such taxes thereafter levied.

[4] In fact the proceeding originally was scheduled for disposition under Section 1.32 of the Commission's Rules of Practice and Procedure, providing for "shortened procedures" where "no issue of substance is raised." Intervenor protests prevented such disposition.

A one-day hearing was held in the present proceeding on January 13, 1959. The Presiding Examiner's intermediate decision was issued on the following February 19. Both the record of the hearing and the decision of the Examiner reflect adherence to and application of the then prevailing, pre-*Catco*, automatic-*prima-facie*-case-in-favor-of-any-initial-price-demanded FPC producer certificate philosophy.

On June 22, 1959, however, that philosophy, along with the 21¢-24¢ southern Louisiana initial price level it had engendered, were thoroughly dispelled by this Court's decision in the *Catco* case. But on August 4, 1959, the 21¢-24¢ initial price line, if not the regulatory philosophy which had produced it, appeared to receive a renewed imprimatur of propriety as a result of the Third Circuit's affirmance of the Commission's Transco-Seaboard decision.[5]

With that inspiration, the Commission promptly (on August 10, 1959) released decisions in five of its pending southern Louisiana high producer initial price proceedings, including the instant one, in which hearings had been completed and intermediate decisions had been issued prior to June 22 (*Catco* Day). In each, the Commission affirmed the intermediate decision and certificated sales at 21¢-24¢ initial price levels upon records as deficient in justification for such prices as had been the *Catco* record itself.

Each of the Commission's five August 10 certificate decisions was appealed by the Public Service Commission of the State of New York (intervenor-petitioner below) or by the United Gas Improvement Company. Each was reversed by the reviewing Court. Two of the five related Court of Appeals decisions have been the subjects of petitions for certiorari, brought by the petitioner herein and others.

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[5] *United Gas Improvement Company* v. *Federal Power Commission*, 269 F. 2d 865.

Those petitions were denied by this Court on April 17, 1961.[6] Time for filing a petition for certiorari has expired in a third.[7]

Reason for Denying the Writ.

The facts in this case are identical in all material respects with those before this Court in *Transco-Seaboard*. The record herein is identical in all material respects with those before the Court below and three other Courts of Appeal on review of the Commission's four companion decisions of August 10, 1959. The reasons advanced in this petition for the granting of the writ are identical in all material respects with those advanced by the present petitioner and others in petitions filed in No. 780 and in Nos. 774, 776 and 793, this term.

The Public Service Commission respectfully submits that the decision below, on its face, is in accord with and furthers the objectives of this Court's decisions and orders of remand in the *Catco* and *Transco-Seaboard* cases. We believe further, that the contentions raised by the instant petition have been disposed of by the Court's orders of

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[6] a. *Texas Gas Transmission Corp., et al.*, 22 F. P. C. 378, rev'd *Pub. Serv. Com.* v. *Fed. Power Comm.*, 287 F. 2d 146 (D. C. Cir. 1960), cert. den. *Hope Nat. Gas Co.* v. *Pub. Serv. Comm.*, 365 U. S. 880 (No. 793) and *Shell Oil Co.* v. *Pub. Serv. Comm.*, 365 U. S. 882 (No. 774) (1961).

b. *The California Co., et al.*, 22 F. P. C. 252, rev'd *U. G. I.* v. *F. P. C.*, 283 F. 2d 817 (9th Cir. 1960) cert. den. *Superior Oil Co.* v. *U. G. I.*, 365 U. S. 879 (No. 780) and *California Co.* v. *U. G. I.*, 365 U. S. 881 (No. 776) (1961).

c. *Sunray Mid-Continent Oil Co.*, 22 F. P. C. 361, rev'd, *U. G. I.* v. *F. P. C.*, 287 F. 2d 159 (10th Cir., 1961).

d. *Sun Oil Corp.*, 22 F. P. C. 351; rev'd *U. G. I.* v. *F. P. C.*, 5th Cir., No. 18112 (February 22, 1961).

e. *The Superior Oil Co.*, 22 F. P. C. 369, rev'd *U. G. I.* v. *F. P. C.*, 5th Cir. No. 18113 (February 22, 1961) (the instant case).

[7] See ftn. 6-c *supra*.

April 17, 1961 denying analogous petitions for certiorari by petitioner and others. Accordingly, we request that the petition be denied.

Respectfully submitted,

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June 16, 1961.

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